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IN THE

Supreme Court of the United States

October Term, 1970

No. 114

CORLON C. KELLER,

Petitioner,

vs.

THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA,

Respondent.

JURISDICTIONAL STATEMENT

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No. .....

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Respondent.

JURISDICTIONAL STATEMENT

OPINIONS BELOW

This is an appeal from the Order of the Court of Appeal of the State of California; Second Appellate District, denying, without opinion or hearing, petitioner's statutory Petition for a Writ of Review brought to review the Order of the California Alcoholic Beverage Control Appeals Board affirming the Order of the Department of Alcoholic Beverage Control revoking petitioner's "on sale" beer license. The California Supreme

Court denied, without opinion, a Petition for Hearing of the said Order of the California Court of Appeal.

JURISDICTION

The jurisdiction of this Court is invoked on the ground that the California Business and Professions Code section 25601 has been sustained against a claim of unconstitutionality under the federal Constitution.

(i) Appellant was charged with a violation of California Business and Professions Code section 25601, which prohibits the keeping of "any disorderly house or place . . . to which people resort for purposes which are injurious to the public morals . . . . " Said charge was used as a basis for the revocation of petitioner's "on sale" beer license.

(ii) The revocation of petitioner's license was affirmed by the Alcoholic Beverage Control Appeals Board; his petition for writ of review was denied by the Court of Appeal on December 17, 1969; and his petition for a hearing before the California Supreme Court was denied on January 14, 1970.

(iii) Jurisdiction of this Court is conferred by Title 28, United States Code, section 1257(2).

(iv) Cases which sustain jurisdiction are: *Champlin Ref. Co. v. Corporation Comm'n*, 286 U.S. 210 (1943); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939); *Connally v. General Constr. Co.*, 269 U.S. 385 (1926); *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966); *Morey v. Doud*, 354 U.S. 457 (1957); *Douglas v. California*, 372 U.S. 353 (1963); *Stirone v. United States*, 361 U.S. 212 (1960).

STATUTES INVOLVED

California Business and Professions Code section 23090.3:

"The findings and conclusions of the department on questions of fact are conclusive and final and are not subject to review. Such questions of fact shall include ultimate facts and the findings and conclusions of the department."

California Business and Professions Code section 23090.5:

(Denies jurisdiction to the Superior Court to)

". . . review, affirm, reverse, correct, or annul any order or decision of the department or to suspend, stay, or delay the operation or execution thereof or to restrain, enjoin, or interfere with the department in the performance of its duty . . . ."

California Business and Professions Code section 25601:

"Every licensee, or agent or employee of a licensee, who keeps, permits to be used, or suffers to be used, in conjunction with a licensed premises, any disorderly house or place in which people abide or to which people resort, to the disturbance of the neighborhood, or in which people abide or to which people resort for purposes which are injurious to the public morals, health, convenience, or safety, is guilty of a misdemeanor."

California Government Code section 11518:

(The decision of the administrative agency)

". . . shall be in writing and shall contain findings of fact, a determination of the issues presented and the penalty, if any."

QUESTIONS PRESENTED

I. Whether California Business and Professions Code section 25601, as applied, violates the Fifth and Fourteenth Amendments' guarantee of due process, because of vagueness.

II. Whether California Business and Professions Code section 25601, as applied, violates the First and Fourteenth Amendments, in that it unconstitutionally impresses an individual licensee to infringe his customers' rights of free speech and association.

III. Whether the failure of the Department of Alcoholic Beverage Control to meet any of the issues presented by the petitioner at his license revocation hearing constituted a violation of due process, in that it denied petitioner his right to a fair hearing.

STATEMENT OF THE CASE

The Department of Alcoholic Beverage Control charged that cause for disciplinary action against petitioner had been established because of purported violation of Business and Professions Code section 25601. In effect, the accusation charged was that homosexuals frequented petitioner's bar and that, on different occasions, clients of petitioner's bar "propositioned" Sheriff's Deputies to commit certain sexual acts repugnant to most Sheriff's Deputies. The solicitations were without the knowledge of the petitioner/licensee, and evidence was offered by the petitioner tending to show that his premises did not disturb the neighborhood.

A second ground (although not clearly separate) was that petitioner was "uncooperative" with the police and, therefore, not a fit person to hold a license, because, according to the police, he resisted a wrongful arrest. This was denied by the petitioner.

No findings were made by the department hearing examiner with respect to the defenses raised by the petitioner, which were, *inter alia*:

1. That section 25601 of the Business and Professions Code was unconstitutionally vague and in violation of the Fourteenth Amendment of the United States Constitution.

2. That in the absence of a showing of knowledge, a licensee cannot be punished for permitting something which the police themselves cannot control, especially where the licensee does everything he can to keep an orderly premises.

3. That the finding of the hearing examiner insofar as the solicitations of the patrons were concerned was supported entirely on hearsay evidence, and received over objection. This was in clear violation of Government Code section 11513(c).

4. That the failure to "cooperate" is not a cause for removing a license, nor does it impute any moral turpitude.

5. That the failure to make findings as required by section 11518 of the Government Code was jurisdictional and no action by the Board could be had without such findings.

In addition, the very real issue had been raised at the Court of Appeal level that Business and Professions Code section 23090 is not only unconstitutional in violation of Article VI, section 10, of the California Constitution, in that it interferes with the constitutionally given power of the Superior Court on writs of mandamus, prohibition and certiorari to be courts

of original jurisdiction, but it also violates Article I, section 21, of the California Constitution, in that said legislation is special legislation granting special privileges and immunities to the Department of Alcoholic Beverage Control, immunizing them and the Appeals Board from any real judicial review, and thus, this licensee, under the Alcoholic Beverage Control Act, is effectively deprived of equal protections and due process of law, in violation of the Fourteenth Amendment of the United States Constitution.

By refusing to consider the judgment of the Alcoholic Beverage Control Appeals Board, the California Supreme Court has decided against petitioner's attacks on the statute. It has, in effect, held that the federal constitutional attack raised by petitioner has no merit; and, therefore, an appeal lies to this Court.

SUBSTANTIALITY OF THE QUESTIONS

The Department of Alcoholic Beverage Control regulates all sales of alcoholic beverages in California, our most populous state. The effect of a suspension or revocation of a license may be very serious but, at its most minimal, is a denial of property, which must be accompanied by due process of law. The practice of the Department, pursuant to section 25601 of the Business and Professions Code, of threatening a revocation of a license for not maintaining an establishment which comports with "public morality," points up grave First Amendment issues. When, as here, violations of "public morality" can be established by the mere speech of the customers in a licensee's bar, and where the Department requires the licensee, under threat of revocation, to somehow stop

these "abuses," it is clear that a serious and insidious potentiality is created for the suppression of free speech by private individuals under the covert compulsion of a governmental agency.

Furthermore, section 25601 of the Business and Professions Code is unconstitutionally vague, in that it permits revocation of licenses if it is shown that the licensee's establishment is one to which people resort for purposes which are injurious to the "public morals." It is clear that such an amorphous standard not only makes it impossible for a licensee to know how to regulate his establishment but it also permits the Department of Alcoholic Beverage Control to act in an arbitrary and capricious fashion by setting itself up as the ultimate arbiter and interpreter of public morals.

ARGUMENT

I

California Business And Professions Code Section 25601 Is Void For Vagueness, Since A Man Of Ordinary Intelligence Could Not Govern His Conduct In Such A Way As To Avoid Prosecution Merely By Reading The Statute.

The test is whether the statute is couched in "words and phrases . . . so vague and indefinite that any penalty prescribed for [its] violation constitutes a denial of due process of law" *Champlin Ref. Co. v. Corporation Comm'n, supra,* 286 U.S. 210, 243. On its face and as applied, section 25601 of the Business and Professions Code contains that fatal deficiency.

This Court has insisted that every sanction that is penal in nature must adequately inform those who might come within its purview of the conduct that is proscribed with such sufficient particularity that they might be able to guide their conduct thereby. *Lanzetta v. New Jersey, supra,* 306 U.S. 451; *Connally v. General Constr. Co., supra,* 269 U.S. 385. Statutes must also provide a certain standard for the determination of guilt. *Giaccio v. Pennsylvania, supra,* 382 U.S. 399.

Section 25601 of the Business and Professions Code states that a licensee is subject to disciplinary action if his establishment is a " . . . place in which people abide or to which people resort . . . *for purposes which are injurious to the public morals* . . . . " (emphasis added). It is submitted that the term "injurious to the public morals" is unconstitutionally vague. What does the term "public morals" refer to? Does it purport to describe conduct which would be decent and moral when done in private but not when done in public; or conduct indecent or immoral, or both, even if private, which outrages the "public" whether done publicly or privately? Furthermore, who constitutes the public?

In the case of *In re Davis,* 242 Cal.App.2d 645, 661, the court said:

> " . . . even a judicial interpretation of 'decency' which would equate that term with *morality would . . . not save the statute.* An Arkansas law prohibited ' . . . any act injurious to the public health, or public morals . . . . ' In *Ex parte Andrew Jackson,* 45 Ark. 158, the Supreme Court of that state said in a case in which the defendant was charged with committing an act 'injurious to

> the public morals: 'We cannot conceive how a crime can, on any sound principle, be defined in so vague a fashion. Criminality depends, under it, upon the moral idiosyncrasies of the individuals who compose the court and jury. The standard of crime would be ever varying, and the courts would constantly be appealed to as the instrument of moral reform, changing with all fluctuations of moral sentiment . . . .'"

Similarly, in *Boretta Enterprises v. Department of Alcoholic Beverage Control*, 75 Cal.Rptr. 79, 98 (1969), the court said that what is contrary to public welfare and morals may be a fit standard for defining the exercise of legislative power. Nevertheless, it gives but a nebulous test for gauging specific human conduct in an adjudicatory proceeding involving the loss of liberty or property. It can only subject the actor to compliance with the whims of those charged with the administration of the laws, on pain of losing his license.

That this Court looks with disfavor on definitions of crime which would leave it to the moral judgment of juries to determine whether or not a crime has, in fact, been committed is demonstrated by *Musser v. Utah*, 333 U.S. 95. In that case the defendant had been convicted under a statute which made it illegal to conspire "to commit acts injurious to public morals . . . ." This Court remanded the case to the Utah Supreme Court, in order to give the court an opportunity to determine what the statute meant. In doing so, this Court said:

> "Standing by itself, it would seem to be warrant for conviction for agreement to do almost any act which a judge and jury might find at the moment contrary

to his or its notions of what was good for health, morals, trade, commerce, justice or order."

II

California Business And Professions Code Section 25601, As Applied, Violates The First And Fourteenth Amendments, In That It Unconstitutionally Impresses An Individual Licensee To Infringe His Customers' Guarantees Of Free Speech And Association.

The Department of Alcoholic Beverage Control, acting in pursuance of section 25601 of the Business and Professions Code, forces the licensee, under threat of revocation of his license, to police his establishment in such a manner that it does not become a " . . . place in which people abide or to which people resort . . . for purposes which are injurious to the public morals . . . . " It is clear that, as applied, this requirement subjects the licensee to revocation of his license if his patrons engage in speech, among themselves, *the content of which* offends "public morality."

Setting aside the grave constitutional deficiencies inherent in the vague term "public morality," it is apparent that, as applied, this statute is being used to coerce the licensee into censoring and inhibiting the expression and association among his clients. The effect of the threat of revocation of his license is to compel the licensee to become the arbiter of the permissibility of the content of his patrons' expressions. Furthermore, given that the licensee is subject in strict liability for any infringement of this amorphous "public morality" requirement, he is induced to be all the more inhibitory and officiously

intrusive into the private conversations of his patrons in order to evade the imposition of a penalty by the Alcoholic Beverage Control Board for some unpredictable infraction.

This is a form of state action; *i.e.*, the licensee, as a private individual, is being invested with public functions. The state is, in effect, encouraging if not compelling an unconscionable intrusion into the sphere of free speech. *Marsh v. State of Alabama*, 326 U.S. 501; *Reitman v. Mulkey*, 387 U.S. 364. It is noteworthy that this Court has recently said:

> " . . . When private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the state and subject to its constitutional limitations."
>
> *Evans v. Newton*, 382 U.S. 296, 299;
>
> *Terry v. Adams*, 345 U.S. 461, 469.

Moreover, the type of policing of free expression which the licensee is compelled to assert against his patrons would clearly be unconstitutional if the state attempted to assert, directly, the same control. *Schenck v. United States*, 249 U.S. 47; *Whitney v. California*, 274 U.S. 357; *Chaplinsky v. New Hampshire*, 315 U.S. 568; *Kingsley Int. Pic. Corp. v. Regents*, 360 U.S. 684.

The state must not be permitted to achieve this unconscionable inhibition of free speech by indirection.

III

California Business And Professions Code Section 23090.5 Is Unconstitutional, In That It Unreasonably Discriminates Between The Department of Alcoholic Beverage Control And Most

Other Agencies, In That It Exempts Its Findings Of Fact From Judicial Review.

Sections 23089 and 23090 of the Business and Professions Code restrict the writ of review only to the appellate court, thereby circumventing the Superior Courts, which, under Article VI, section 10, of the California Constitution:

> " . . . have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition."

The legislature, through the adoption of sections 23089 and 23090, has sought to exempt the Department of Alcoholic Beverage Control from the rigors of a judicial scrutiny by a trial court (and also apparently by the appellate court) as to any questions of fact.

Section 23090.5, in denying jurisdiction to the Superior Court, not only conflicts with Article VI, section 10, of the California Constitution but it is also unconstitutional in that it unreasonably differentiates the Department of Alcoholic Beverage Control from most other administrative agencies, in exempting its findings of fact from judicial review. There seems to be no rational basis for such preferential treatment, and thus, the discrimination thereby engendered bears no reasonable relation to a proper legislative object and is hence unconstitutional.

Although this section withstood an attack as being unconstitutional for vagueness in *Department of Alcoholic Beverage Control v. Superior Court for the County of Orange*, 73 Cal. Rptr. 780, that case constitutes no relevant precedent for the issue raised here; *i.e.*, the unconstitutionality of the section because of a violation of "equal protection" of the laws.

Moreover, under section 23090.3, "[t]he findings and conclusions of the department on questions of fact are conclusive and final and are not subject to review. Such questions of fact shall include ultimate facts and the findings and conclusions of the department."

This section is a transparent attempt to get around the constitutional right to have a court inquire into frivolous findings and sham proceedings unsupported by any true factual basis.

It has been stated that due process of law requires that an administrative determination be based upon substantial and legally competent evidence, and that whether there is such evidence is a question of law. *The Universal Camera Corp. v. NLRB*, 340 U.S. 474; *Bridges v. Wixon*, 326 U.S. 179; *Walker v. San Gabriel*, 20 Cal. 2d 879.

It is submitted that the purpose of the legislation here was to foreclose completely the liquor licensee from meaningful review by the courts and that such a classification as embodied in these sections is invidious and discriminatory and must be stricken down.

IV

The Failure Of The Department Of Alcoholic Beverage Control To Meet Any Of The Issues Presented By The Petitioner At His License Revocation Hearing Constituted A Violation Of Due Process, In That It Denied Petitioner His Right To A Fair Hearing.

Under section 11518 of the California Government Code, the decision of an administrative agency "shall be in writing

and shall contain findings of fact, a determination of the issues presented and the penalty, if any."

Section 11501 of the Government Code makes the Department of Alcoholic Beverage Control subject to the requirements of section 11518.

The decision and findings of the hearing officer adopted by the Department of Alcoholic Beverage Control did not meet any of the issues presented by the petitioner and, thus, violated section 11518 of the Government Code in not presenting all of the issues and passing upon them. Specifically, issues were raised by the petitioner at the time of the hearing that the statutes under which he was charged were unconstitutional both on their face and vague as applied. These issues were totally ignored in the findings of the Board.

The failure of the administrative agency deprived petitioner of due process and a fair hearing. To permit an agency to arrive at a determination in the process of which it disregards the issues raised by the party charged would be to condone and sanction a practice that could only be productive of arbitrary and sham decisions by that agency.. This Court has said that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. *Morgan v. United States,* 304 U.S. 1.

Furthermore, on a pragmatic level, such a result would make judicial review of administrative decisions merely perfunctory. It is, after all, a "simple but fundamental rule of administrative law" that the orderly functioning of the process of review "requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." *SEC v. Chenery Corp.,* 332 U.S. 194, 196; *SEC v.*

Chenery Corp., 318 U.S. 80, 94.

As Mr. Justice Cardozo has so appropriately stated:

> "We must know what a decision means before the duty becomes ours to say whether it is right or wrong."
>
> *United States v. Chicago, M., St. P. & P.R.R.*, 294 U.S. 499, 511.

It is submitted that it is impossible for any reviewing court to know what an administrative decision "means," in any just sense, if that agency refused to address itself to the critical and fundamental issues presented by the defendant at the administrative hearing.

CONCLUSION

For the reasons stated above, this appeal involves serious unresolved constitutional questions which this Court should decide.

Respectfully submitted,

BURTON MARKS, ESQ.

MARKS, SHERMAN and LONDON

Attorney for Petitioner

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 315 Third Street, Huntington Beach, California 92646, that on MARCH , 1970, I served the within JURISDICTIONAL STATEMENT (Corlon C. Keller v. The Department of Alcoholic Beverage Control of the State of California) on the following named parties by depositing a copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
1215 "O" STREET
SACRAMENTO, CALIFORNIA [2 COPIES]

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD
1215 "O" STREET
SACRAMENTO, CALIFORNIA

ATTORNEY GENERAL, STATE OF CALIFORNIA
600 STATE BUILDING
LOS ANGELES, CALIFORNIA 90012

I declare under penalty of perjury that the foregoing is true and correct.

Executed on MARCH , 1970, at HUNTINGTON BEACH, CALIFORNIA.

_____
D. A. Standefer

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WASHINGTON, D. C.

Dean-Standefer Co., 315 3rd St., Huntington Beach, Calif.
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IN THE

Supreme Court of the United States

October Term, 1970
No. 114
(Was No. 1362, October Term, 1969)

CORLAN C. KELLER,

Appellant,

vs.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA,

Appellee.

On Appeal From the Court of Appeal of California Second Appellate District

MOTION TO DISMISS

Pursuant to Rule 16(1)(b), appellee moves the Court to dismiss the appeal herein on the ground that there is no substantial federal question presented.

I

THE STATE STATUTES INVOLVED AND THE NATURE OF THE CASE

A. The Statutes

This appeal raises the question of the validity of two sections of the California Alcoholic Beverage Control Act, a comprehensive scheme to regulate the manufacture, sale, and disposition of alcoholic beverages

within the State of California. (West's Ann. Cal. Bus. & Prof. Code §§ 23000 *et seq.*)

Section 25601, in conjunction with section 24200(a), makes subject to suspension or revocation any license associated with a "disorderly house or place . . . to which people resort for purposes which are injurious to the public morals, health, convenience, or safety, ..." (West's Ann. Cal. Bus. & Prof. Code §§ 24200(a), 25601.)

The regulatory scheme provides for an administrative agency, the California Department of Alcoholic Beverage Control, hereinafter called "the Department," one of whose duties it is to suspend or revoke alcoholic beverage licenses for good cause. (Cal. Const., art. XX, § 22; West's Ann. Cal. Bus. & Prof. Code §§ 23050, 23051.) Any Department decision to suspend or revoke a license is subject to review by a three-member Alcoholic Beverage Control Appeals Board, hereinafter called "the Appeals Board." (Cal. Const., art. XX, § 22; West's Ann. Cal. Bus. & Prof. Code §§ 23075, 23081.)

Formerly, decisions of the Department and of the Appeals Board could be reviewed by petition to the state trial courts at the superior court level. The enactment of sections 23090 and 23090.5 in 1967 limited such judicial review to the State Supreme Court and Courts of Appeal only. (West's Ann. Cal. Bus. & Prof. Code §§ 23090, 23090.5.)

Pertinent portions of the relevant statutes and of the California Constitution are printed as Appendix A to this motion.

B. The Proceedings Below

In California, proceedings to suspend or revoke a liquor license are initiated by the filing of an accusation, which is a specification of facts alleged as grounds for disciplinary action against the license. The Department filed a two-count accusation against appellant. Count Two charged that appellant wilfully and knowingly interfered with and obstructed a police officer who was attempting to effect an arrest on the licensed premises. Count Two further charged that appellant, after being lawfully arrested for his interference with the police officer, and without any provocation, kicked a second police officer in the groin and kicked a third officer in the back.

Count One included the allegations of Count Two as grounds for finding that appellant kept or permitted to be kept, a disorderly house in conjunction with the licensed premises. In further support of making such a finding, the accusation alleged that fifteen separate solicitations for criminal homosexual acts took place on the licensed premises within a sixteen-day period.

Hearing was held on the accusation. Appellant was present and was represented by an attorney. Appellant stipulated to certain anticipated testimony and further evidence was presented. A decision was adopted finding that the factual allegations of the accusation were true.

Appellant's license was revoked on each count separately. Revocation was stayed for six months on the condition that there be a thirty-day suspension of the license and on the further condition that appellant transfer the license within six months to a person acceptable to the Department.

The text of the Department's decision is set out in full as Appendix B to this motion.

The case was taken to the Appeals Board and the Department's decision was there affirmed. The text of the Appeals Board's Decision is set out in full as Appendix C to this motion.

The State Court of Appeals and the State Supreme Court each denied, without opinion, appellant's petition to review the Department's decision.

II

ARGUMENT

A. Section 25601 of The California Business and Professions Code Is Not Void For Vagueness

Section 25601 of the California Business and Professions Code prohibits, *inter alia*, the keeping of a place in which people abide or to which people resort for purposes which are "injurious to the public morals." Appellant contends that the portion of the statute in quotation marks is unconstitutionally vague, both as worded and as applied. (Jurisdictional Statement, pp. 7-8.)

The test of certainty is that the statute in question must be sufficiently explicit to inform those who are subject to its operation what conduct on their part will render them liable to its penalties.

> "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connolly v. General Const. Co.*, 269 U.S. 385, 391 (1926).

The State Supreme Court has interpreted section 25601 to mean that the Department must present proof of illegal, immoral, or indecent act on the premises. The license cannot be disciplined on a showing merely of resorting or patronage by sexual perverts. *Vallerga v. Dept. Alcoholic Bev. Control,* 53 Cal. 2d 313, 321; 1 Cal.Rptr. 494, 347 P.2d 909 (1959).

Appellant's basic objection presumably is to the phrase "public morals." On page 9 of his Jurisdictional Statement, appellant cites a 1969 California Court of Appeal case which denigrates the phrase "contrary to public welfare and morals" as a standard of conduct in an adjudicatory proceeding where loss of liberty or property is involved. The California Supreme Court granted a hearing in this case with the result that the Court of Appeal decision cited by appellant is of no effect. The State Supreme Court opinion sets a standard for the Department to use in determining what is contrary to public morals as follows:

> "We here examine the power invested by the [state] Constitution in the Department to revoke a specific alcoholic beverage license 'if it shall determine *for good cause* that the . . . continuance of such license would be contrary to *public* . . . morals, . . .' . . . . This requires us to observe the distinction between private morality and public morality, ... In other words, in resolving the issue before us, our reference must be to the morals of the people, that is, to those of the community at large, of the whole body of the people. . . . [W]e think the term 'public morals' must be taken to mean the moral practices or modes of conduct '[p]ertaining to a . . . whole community; . . . re-

lating to . . . the whole body of people or an entire community. . . .' . . . ." *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control,* 2 Cal. 3d 85, 100-01; 84 Cal.Rptr. 113, 465 P.2d 1 (1970).

It is clear then that the Court is not faced with a statute which would leave *definition* of the offense up to the trier of fact in each individual case. *See Musser v. Utah,* 333 U.S. 95, 97 (1948), cited by appellant.

The further question remains: whether the state standard is in itself constitutionally permissible.

The Court has consistently held that the Twenty-first Amendment bestowed upon the states broad regulatory power over the liquor traffic within their boundaries. In these matters the Court has stated that it will not substitute its social or economic beliefs for the judgment of a legislative body. *Seagram & Sons v. Hostetter,* 384 U.S. 35, 42, 47 (1966); *Crowley v. Christensen,* 137 U.S. 86, 91 (1890).

The police power of the states is fully competent to prohibit or regulate the sale of alcoholic beverages within its borders. It is a question of public expediency and public morality, not of federal law. There is no inherent right or privilege in a citizen to sell alcoholic beverages. *Crowley v. Christensen, supra.* The Fourteenth Amendment does not prevent legislation intended to regulate or prohibit any business which is inherently harmful. *Murphy v. California,* 225 U.S. 623, 628 (1912).

The federal courts have upheld a similarly worded prohibition in the Alcoholic Beverage Control Act for the District of Columbia. (25 D.C.Code § 118.) In

Am-Chi Restaurant, Inc. v. Simonson, 396 F.2d 686 (D.C. Cir. 1968), the statute upheld allowed suspension or revocation of a liquor license where the licensed premises are allowed to be used "for any unlawful, disorderly, or immoral purpose. . . ."

B. Section 25601 of The California Business and Professions Code, As Applied to Appellant, Is Not In Violation of The First and Fourteenth Amendments

In support of the Department's determination that appellant had violated section 25601 of the California Business and Professions Code, there were findings that fifteen verbal homosexual solicitations of sodomy or oral copulation, or both, were made on the licensed premises between October 17, 1967, and November 1, 1967. Appellant contends that because the prohibited conduct was verbal, he could escape discipline only by infringing his patrons' freedom of expression. Appellant claims that the state could not, by direct action, prohibit the verbal conduct complained of and therefore cannot compel appellant to prohibit that conduct under threat of disciplining appellant's license.

On page 4 of the Jurisdictional Statement, appellant states that patrons of the licensed premises solicited "sexual acts repugnant to most Sheriff's Deputies." The record does not disclose that any evidence was ever presented to show what percentage of deputy sheriffs would be repelled by homosexual solicitations for sodomy or for oral copulation. The Department could take official notice however that sodomy is made a crime by section 286 of the California Penal Code and that oral copulation is made a crime by section 288a

of the California Penal Code. Solicitation of such acts is made a crime by section 647(1) of the California Penal Code.

We are not concerned with simple speech as has been implied by appellant. We are concerned with speech which is in itself a crime and which is intended to induce further criminal acts. This conduct is clearly within the state standard for determining Business and Professions Code section 25601 violations that there must be proof of criminal, or immoral, or indecent acts on the premises. It is not necessary even to go into the question of immoral or indecent acts for these acts are alternative to the proven criminal conduct. A man may be punished for encouraging the commission of a crime. *Fox v. Washington,* 236 U.S. 273, 277-78 (1915).

C. There Is No Denial of Due Process In A System Whereby Factual Determinations Of An Administrative Agency Are Subject To Review Only On The Question of Whether Or Not There Is Any Substantial Evidence In The Record To Support The Administrative Findings

Appellant contends that the state statute which limits review of Department decisions to the State Court of Appeal and Supreme Court is unconstitutional. His attack is directed at the validity of the statute in relation to the provisions of the *state* Constitution. It should therefore not be considered by this Court. *Miller v. Cornwall Railroad Company,* 168 U.S. 131, 134 (1897).

Appellant's further contention is that section 23090.3 of the California Business and Professions Code violates the Due Process Clause of the Fourteenth

Amendment because the statute says that the Department's findings and conclusions on questions of fact are not subject to judicial review. However, section 23090.2 of the California Business and Professions Code should be called to the Court's attention. In pertinent part that statute reads:

> "The review by the court shall not extend further than to determine, based on the whole record of the department as certified by the board, whether:
>
> ". . . .
>
> "(d) The findings in the department's decision are supported by substantial evidence in the light of the whole record."

Subsection (d) contains practically the identical standard for judicial review as is mandated by the Federal Labor-Management Relations Act (Taft-Hartley Act) and by the Federal Administrative Procedure Act. That standard found acceptance in the case relied upon by appellant in the Jurisdictional Statement, *Universal Camera Corp. v. Labor Bd.*, 340 U.S. 474, 488, 493 (1951).

Coincidentally, *Universal Camera* is concerned with the scope of judicial review after a decision of the Labor Board pursuant to the Taft-Hartley Act. The first level of judicial review of such decisions is in the United States Court of Appeals, 29 U.S.C.A. § 160(f). As in the state liquor act, the trial court is bypassed as the first level of review.

In both cases, the reason for bypassing the trial court appears to be that the administrative decisions emanate from bodies ostensibly possessed of considerable expertise in their fields. Since the scope of review as to factual matters is limited to the substantial evidence test, there would be no good reason for burdening the trial courts with a matter which could not be tried *de novo*.

The State Court of Appeal has considered the question of whether the right to judicial review has been impaired by eliminating the trial court level of review. In holding that such right was not impaired, the state court noted that prior to 1967, there were three levels of review of the Department's decisions, with the *scope* of review being the same at each level. Elimination of one duplicative level of review harms no one. *Dept. of Alcoholic Bev. Control v. Superior Court*, 268 Cal. App. 2d 67, 71-75; 73 Cal.Rptr. 780 (1968).

The provision in question is similar to provisions in regard to decisions of the California Industrial Accident Commission and the California Public Utilities Commission. The Utilities Commission provision is contained in section 1759 of the California Public Utilities Code. The judicial review provision at issue here was upheld by the California Supreme Court in a decision to which this Court denied certiorari. *People v. Superior Court*, 62 Cal. 2d 515, 518; 42 Cal.Rptr. 849, 399 P.2d 385, *cert. denied, sub nom. Dyke Water Co. et al. v. Public Utilities Commission of California et al.*, 380 U.S. 980 (1965).

D. The State Administrative Decision Sufficiently Determined the Issues Presented So That No Question of Due Process Is Present

On page 5 of the Jurisdictional Statement, appellant lists five issues which he claims were not passed on by the Department hearing examiner.

It would appear that if these issues are material, then the Department decided, by necessary implication, the issues adversely to appellant. If the issues are not material, then no specific finding or determination was necessary.

Appellant makes a number of statements of the law on pages 14 and 15 of the Jurisdictional Statement. Appellee agrees completely with those statements but finds no application for them in the matters at hand.

Apparently appellant contends that an administrative agency must make a specific written finding as to every issue raised by the party respondent to an accusatory pleading.

It is true that section 11518 of the California Government Code requires that the administrative decision shall contain a written determination of the issues presented. If the section is read as a whole, however, it is clear that the issues to be determined are those issues presented in the pleadings in the matter. *See* Appendix A for the text of the statute. Appellant has not referred the Court to any part of the record to substantiate his claim that the Department ignored any material issues presented at the administrative hearing.

The truth of the matter is that all of the material issues raised by appellant were decided or ruled upon at the earliest level possible. It is obvious, for example, that number 5 on page 5 of the Jurisdictional Statement could not have been presented to the administrative hearing officer, but the issue was considered by the Appeals Board. *See* Appendix C.

An examination of the Department's decision in Appendix B and of the Appeals Board's decision in Appendix C shows that appellant's contentions were considered and decided.

Appellant's claim that he could not have his liquor license disciplined without proof that he had knowledge of the homosexual solicitation does warrant further answer here. State law holds that discipline of a licensee for violation of section 25601 of the California Business and Professions Code (disorderly house, etc.) may be imposed even though it is not shown that the licensee condoned or had personal knowledge of such conduct. *Morell v. Dept. of Alcoholic Bev. Control,* 204 Cal. App. 2d 504, 511-12; 22 Cal.Rptr. 405, *hearing denied* by California Supreme Court (1962).

Federal law is in substantial agreement on this question. *Am-Chi Restaurant, Inc. v. Simonson, supra,* 396 F.2d 686, 688 (D.C. Cir. 1968).

Conclusion

Wherefore, appellee respectfully submits that the questions upon which this cause depend are so unsubstantial as not to need further argument, and appellee respectfully moves the Court to dismiss this appeal.

DATED: August 10, 1970.

Respectfully submitted,

THOMAS C. LYNCH,
Attorney General of the State of California,

ANTHONY M. SUMMERS,
Deputy Attorney General,

EDWARD DUDDY,
Deputy Attorney General,

Attorneys for Appellee.

APPENDIX A.

Pertinent Portions of Relevant Statutes.

CALIFORNIA BUSINESS AND PROFESSIONS CODE SECTION 23050:

> "There is in the State Government a Department of Alcoholic Beverage Control. . . ."

CALIFORNIA BUSINESS AND PROFESSIONS CODE SECTION 23051:

> "On and after January 1, 1955, the department shall succeed to all the powers, duties, purposes, responsibilities, and jurisdiction now conferred on the State Board of Equalization under Section 22 of Article XX of the Constitution and this division, ..."

CALIFORNIA BUSINESS AND PROFESSIONS CODE SECTION 23075:

> "There is in the State Government an Alcoholic Beverage Control Appeals Board . . . ."

CALIFORNIA BUSINESS AND PROFESSIONS CODE SECTION 23081:

> "On or before the tenth day after the last day on which reconsideration of a final decision of the department can be ordered, any party aggrieved by a final decision of the department may file an appeal with the board from such decision. . . ."

CALIFORNIA BUSINESS AND PROFESSIONS CODE SECTION 23090

> "Any person affected by a final order of the board, including the department, may, within the time limit specified in this section, apply to the

Supreme Court or to the court of appeal for the appellate district in which the proceeding arose, for a writ of review of such final order. . . ."

CALIFORNIA BUSINESS AND PROFESSIONS CODE SECTION 23090.5

"No court of this state, except the Supreme Court and the courts of appeal to the extent specified in this article, shall have jurisdiction to review, affirm, reverse, correct, or annul any order, rule, or decision of the department . . . ."

CALIFORNIA BUSINESS AND PROFESSIONS CODE SECTION 24200:

"The following are the grounds which constitute a basis for the suspension or the revocation of licenses:

"(a) When the continuance of a license would be contrary to public welfare or morals; but proceedings under this section upon this ground are not a limitation upon the department's authority to proceed under Article XX, Section 22, of the Constitution. . . ."

CALIFORNIA BUSINESS AND PROFESSIONS CODE SECTION 25601:

"Every licensee, or agent or employee of a licensee, who keeps, permits to be used, or suffers to be used, in conjunction with a licensed premises, any disorderly house or place in which people abide or to which people resort, to the disturbance of the neighborhood, or in which people abide or to which people resort for purposes which are injurious to the public morals, health, convenience, or safety, is guilty of a misdemeanor."

CALIFORNIA GOVERNMENT CODE SECTION 11518:

"The decision shall be in writing and shall contain findings of fact, a determination of the issues presented and the penalty, if any. The findings may be stated in the language of the pleadings or by reference thereto. Copies of the decision shall be delivered to the parties personally or sent to them by registered mail."

CALIFORNIA CONSTITUTION, ARTICLE 20, SECTION 22:

"Sec. 22. The State of California, subject to the internal revenue laws of the United States, shall have the exclusive right and power to license and regulate the manufacture, sale, purchase, possession and transportation of alcoholic beverages within the State, ...

"The Department of Alcoholic Beverage Control shall have the exclusive power, except as herein provided and in accordance with laws enacted by the Legislature, to license the manufacture, importation and sale of alcoholic beverages in this State, . . . The department shall have the power, in its discretion, to deny, suspend or revoke any specific alcoholic beverages license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals, ...

"The Alcoholic Beverage Control Appeals Board shall consist of three members appointed by the Governor, ...

"When any person aggrieved thereby appeals from a decision of the department ordering any penalty assessment, issuing, denying, transferring, suspending or revoking any license for the manufacture, importation, or sale of alcoholic beverages, the board shall review the decision subject to such limitations as may be imposed by the Legislature. . . . Review by the board of a decision of the department shall be limited to the questions whether the department has proceeded without or in excess of its jurisdiction, whether the department has proceeded in the manner required by law, whether the decision is supported by the findings, and whether the findings are supported by substantial evidence in the light of the whole record. . . ."

APPENDIX B.

Certificate of Decision.

State of California, Department of Alcoholic Beverage Control.

File 63859
Reg. 4899

It is hereby certified that a Hearing Officer of the Office of Administrative Procedure having submitted the attached proposed decision, and the Department of Alcoholic Beverage Control, having reviewed the findings of fact, determination of issues and recommended penalty, adopted said proposed decision as its decision in the case therein described on January 23, 1969.

A representative of the Department will call on you on or after March 13, 1969, to pick up the license certificate.

Sacramento, California
Dated: January 23, 1969.

/s/ Dorothy Pierson
Hearing and Legal Unit

ABC-132 (1-67)

Proposed Decision.

State of California, Department of Alcoholic Beverage Control.

135 Folios

In the Matter of the Accusation against Corlan C. Keller, The Stampede, 7832 Santa Monica Boulevard, Los Angeles, Respondent and Licensee under the Alcoholic Beverage Control Act.

File 63859

Licenses: 40-63859

Reg. 4899

Time of Hearing: 4-30-68 and 10-29-68

Place of Hearing: 314 W. First St., L. A.

Reporter: D. Hoffman & J. Crawford OLA 17239

Appearances: For Dept: Frank Britt, Asst. Counsel. For Resp: Mr. Burton Marks and Mr. David Merrihugh, Attorneys at Law, 8447 Wilshire Boulevard, Beverly Hills, California.

I hereby certify that the following constitutes my proposed decision in the above-entitled matter as a result of the hearing held before me at the above time and place, after due notice having been given according to law, and I hereby recommend its adoption as the decision of the Department of Alcoholic Beverage Control.

On April 30, 1968, the Department was prepared to proceed and its witnesses were present. By stipulation between counsel it was agreed that if called, each of the Los Angeles County Deputy Sheriffs named in subcounts 1 through 15 of Count I of the accusation would testify to those facts as set forth in the respective subcounts. This stipulation was accepted. Thereafter,

upon motion by respondent, which was not opposed by the Department, the matter was continued for further hearing to June 27, 1968.

Counsel for respondent did urge the dismissal of the accusation on April 30, 1968, upon the following grounds:

(1) This proceeding wherein respondent could be called as a witness by the Department would be in violation of respondent's protection under the fifth Amendment to the United States Constitution.

(2) The accusation does not state a basis for disciplinary action in that it does not plead that respondent had actual knowledge of the incidents described in Count I, subcounts 1 through 15. Further, if the statute fails to require actual knowledge such statue is unconstitutional.

(3) That this proceeding is in fact a criminal proceeding and therefore respondent is entitled to a trial by jury. In the event the Department is not authorized by law to provide a trial by jury, that the Department has no jurisdiction to proceed.

Each of the motions were overruled.

On June 27, 1968, respondent moved to strike the testimony of the deputy sheriffs stipulated to on April 30th on the grounds that such testimony would be hearsay as to the licensee. Respondent's motion was denied.

FINDINGS OF FACT:

COUNT I

From October 17, 1967, until the date of the filing of this accusation, the respondent licensee directly and through his agents and employees did suffer and permit to be kept at the above described licensed premises a disorderly house and a place to which people abided and resorted to the disturbance of the neighborhood and for purposes which were and are contrary to public welfare and morals, health, convenience and safety as follows:

(1) On October 17, 1967, and in said premises, Robert Stangl, described as a male caucasian, approximately 5'6", 130 pounds, brown hair, Blue eyes, 26 years of age, did solicit Deputy Sheriff K. Niemi to engage in homosexual acts of oral copulation and sodomy.

(2) On October 17, 1967, and in said premises, Jose Bruno Fajardo, described as a male caucasian approximately 5'7", 147 pounds, black hair, brown eyes, 32 years of age, did solicit Deputy Sheriff Ray DeGenaro to engage in a homosexual act of oral copulation and did place his hand on the left leg of said Ray DeGenaro, in the vicinity of his crotch.

(3) On October 8, 1967, and in said premises, Herbert Hantz Pagassinger, described as a male caucasian, approximately 5'8", 147 pounds, black hair, brown eyes, 37 years of age, did solicit Deputy Sheriff D. Ane to engage in a homosexual act of sodomy.

(4) On October 18, 1967, and in said premises, John Gilbert Valencia, described as male caucasian, approximately 5'9", 140 pounds, brown hair, brown eyes, 29 years of age, did solicit Deputy Sheriff R. J.

Barrier to engage in homosexual acts of oral copulation and sodomy.

(5) On October 18, 1967, and in said premises, Lorenzo Agapito Martinez, described as male caucasian, approximately 5′4″, 138 pounds, black hair, brown eyes, 21 years of age, did solicit Deputy Sheriff Gary Burke to engage in a homosexual act of oral copulation and did additionally caress the right thigh area of the said Gary Burke.

(6) On October 18, 1967, and in said premises, David Crispin Weiser, described as a male caucasian, approximately 6′0″, 190 pounds, brown hair, brown eyes, 25 years of age, did solicit Deputy Sheriff J. Berger to engage in a homosexual act of oral copulation.

(7) On October 18, 1967, and in said premises, Anthony DeCusatis, described as a male caucasian, approximately 5′8″, 160 pounds, brown hair, brown eyes, 27 years of age, did solicit Deputy Sheriff E. Ward to engage in a homosexual act of oral copulation.

(8) On October 23, 1967, and in said premises, Martin Maharis, also known as Michael L. Corsentino, described as male caucasian, approximately 5′7″, 135 pounds, brown hair, brown eyes, 23 years of age, did solicit Deputy Sheriff A. J. Vereb to engage in a homosexual act of oral copulation.

(9) On October 28, 1967, and in said premises, Kenneth St. Clair Scott, described as a male caucasian, approximately 5′7″, 155 pounds, brown hair, gray eyes, 30 years of age, did solicit Deputy Sheriff R. J. Barrier to engage in a homosexual act of sodomy.

(10) On October 28, 1967, and in said premises, Robert Norman Henry, described as a male caucasian,

approximately 5'8", 140 pounds, brown hair, blue eyes, 33 years of age, did solicit Deputy Sheriff G. E. Burke to engage in a homosexual act of oral copulation.

(11) On November 1, 1967, and in said premises, Joseph Henderson Hollyfield, described as male caucasian, approximately 6'4", 180 pounds, brown hair, brown eyes, 28 years of age, did grasp the private parts of Deputy Sheriff R. J. Barrier and solicit the said R. J. Barrier to engage in a homosexual act of oral copulation.

(12) On November 1, 1967, and in said premises, Cornelio Mendez, described as male caucasian, approximately 5'6", 140 pounds, black hair, brown eyes, 31 years of age, did solicit Deputy Sheriff Robert J. Barrier to engage in a homosexual act of sodomy and oral copulation.

(13) On November 1, 1967, and in said premises, Greg Wilson, also known as Harry Hersh, Jr., described as male caucasian, approximately 5'10", 152 pounds, black hair, brown eyes, 28 years of age, did rub the gential area of Deputy Sheriff Robert J. Barrier and did solicit the said Robert J. Barrier to engage in a homosexual act of sodomy.

(14) On November 1, 1967, and in said premises, Maurice Vincent Morales, described as male caucasian, approximately 6'0" 170 pounds, brown hair, brown eyes, 33 years of age, did solicit Deputy Sheriff J. Berger to engage in a homosexual act of oral copulation.

(15) On November 1, 1967, and in said premises, Cyril J. Martinez, described as male caucasian, approximately 5'4", 105 pounds, brown hair, brown

eyes, 22 years of age, did solicit Deputy Sheriff R. D. Stockton to engage in a homosexual act of oral copulation.

(16) On November 1, 1967, and in and about said premises, the above-named licensee, Corlan C. Keller, did, when he knew R. E. Stockton, R. G. Berger, and E. G. Ward were peace officers then and there engaged in the discharge and attempt to discharge their duties of office, wilfully resist, delay and obstruct said peace officers in a manner more specifically set forth below:

(a) Immediately after the commission of the offenses described under subparagraph (15) above, and before an arrest of Cyril J. Martinez could be executed, Corlan C. Keller, stated to Cyril J. Martinez, in reference to Deputy Sheriff R. D. Stockton, "He's vice and he'll bust you." This statement was made in a low voice almost whispered into the ear of Cyril J. Martinez as Deputy Stockton and Mr. Martinez had left the premises. Mr. Keller then stepped back and in a louder than normal voice stated to Mr. Martinez, "Didn't you leave something inside?" Cyril J. Martinez immediately fled to the interior of the licensed premises and Corlan C. Keller took position at the front entrance to said premises and did detain R. D. Stockton from entering the premises in order to affect the arrest of Cyril J. Martinez by demanding that R. D. Stockton present several pieces of identification. At this time Mr. Keller stated to Deputy Stockton, "I know who are you, but you're not getting inside." Utlimately Deputy Stockton was successful in gaining entrance to the premises and he located Mr. Martinez in the men's rest room.

(b) After the arrest of Mr. Martinez respondent Corlan C. Keller was arrested and charged with a violation of Section 148 of the Penal Code. Mr. Keller did physically resist his arrest and did struggle against being placed in the transporting vehicle. At this time he kicked Deputy E. G. Ward in the groin area. Mr. Keller was handcuffed at this time and a headlock applied to restrain him. While en route to the sheriff's station respondent made statements to the arresting officers, in substance, "Now you are in trouble. I have friends. You will never hear the end of this." At one point Mr. Keller, who was a passenger in the back seat, raised his leg, or legs, and struck Officer Burger, a passenger in the front seat, in the area of the back.

COUNT II

Continuance of the above designated license would be contrary to the public welfare and morals in that respondent, Corlan C. Keller, is not a qualified person to hold a license as shown by his conduct. The findings as to the entire subcount (16) are hereby incorporated by this reference as though fully set forth and restated herein.

FINDINGS AS TO PREVIOUS RECORD:

Licensed since July 26, 1967. No prior disciplinary action.

DETERMINATION OF ISSUES PRESENTED:

Respondent violated Section 25601 of the Business and Professions Code as to Count I and permitted violations of Section 647(a) of the California Penal Code as to Count I. Respondent did violate Section 148 of the California Penal Code. Respondent has dem-

onstrated that he is antagonistic and uncooperative toward law enforcement officers and by such conduct respondent has demonstrated that he is not a qualified person to hold a license. Under such circumstances continuance of the license would be contrary to public welfare and morals as to Count II. Grounds for the suspension or revocation of the license were established under the provisions of Section 24200(a) of the Business and Professions Code and Article XX, Section 22 of the California Constitution.

PENALTY:

The license is revoked on each Count, separately considered and independently imposed. The revocation is stayed upon the condition that the license be suspended for thirty (30) days and indefinitely thereafter until transferred to a person or persons acceptable to the Department and if that transfer is not completed within six months after the effective date of the Department's decision then the stay shall terminate and the revocation shall be made effective upon the further order of the Director of Alcoholic Beverage Control.

Dated at Los Angeles, California, November 7, 1968.

/s/ John A. Willd
JOHN A. WILLD, Hearing Officer
Officer of Administrative Procedure

APPENDIX C.

Before the Alcoholic Beverage Control Appeals Board of the State of California.

In the Matter of the Accusation against Corlan C. Keller, The Stampede, 7832 Santa Monica Boulevard, Los Angeles, Respondent and Licensee under the Alcoholic Beverage Control Act. AB-3222.

File No. 63859; Reg. No. 4899.

Time & Place of Hearing: August 28, 1969, at 2 p.m., 107 South Broadway, Los Angeles, California.

For Department: Honorable Thomas Lynch, Attorney General, Thomas Kerrigan, Deputy Attorney General.

For Appellant: Burton Marks, Esq. (No appearance at oral argument.)

Appellant is the holder of an on-sale beer license for premises located at 7832 Santa Monica Boulevard, Los Angeles. In a decision of the Department of Alcoholic Beverage Control dated January 23, 1969, appellant was determined to have permitted his licensed premises to be used as a disorderly house or a place to which people abided and resorted to the disturbance of the neighborhood and for purposes contrary to public welfare or morals in violation of section 25601 of the Alcoholic Beverage Control Act; article XX, section 22 of the California Constitution; and section 24200(a) of the Alcoholic Beverage Control Act. It was also determined that appellant permitted violations of section 647(a), Penal Code (disorderly conduct), and to have violated section 148, Penal Code (resisting public officers in the discharge of their duty), count I. In count

II the department determined that appellant was not a qualified person to hold an alcoholic beverage license.

The above violations were determined to establish grounds for disciplinary action under section 22, article XX of the Constitution, and section 24200(a) of the Alcoholic Beverage Control Act. A separate penalty of revocation of appellant's license was imposed as to each count. The order of revocation was stayed upon condition that the license be suspended for 30 days and indefinitely thereafter until transferred to a person or persons acceptable to the department.

Appellant's appeal is based upon the grounds: (1) the decision was contrary to the law; (2) the acts described in count I, paragraphs (1) through (15) were hearsay as to the licensee and could not be used as a basis for setting aside a license; (3) that unless it could be shown that the acts complained of were caused by the licensee or consented to or contributed by him, they represented a police problem and it was the duty of the police to prevent, not of the licensee; (4) with respect to the finding of moral unfitness to the extent that it is based on a resisting arrest charge, such is contrary to the law and a denial of due process of the law since there is no duty for anyone to cooperate with a police officer; (5) the determination of issues presented did not meet the issues which were in the accusation; (6) no consideration was given to any evidence produced by the licensee; and (7) the penalty recommended to be imposed is disporportionate to the offense committed.

The decision of the department contains the following:

"FINDINGS OF FACT:

"COUNT I

"From October 17, 1967, until the date of the filing of this accusation, the respondent licensee directly and through his agents and employees did suffer and permit to be kept at the above described licensed premises a disorderly house and a place to which people abided and resorted to the disturbance of the neighborhood and for purposes which were and are contrary to public welfare and morals, health, convenience and safety as follows:

"(1) On October 17, 1967, and in said premises, Robert Stangl, described as a male caucasian, approximately 5'6", 130 pounds, brown hair, Blue eyes, 26 years of age, did solicit Deputy Sheriff K. Niemi to engage in homosexual acts of oral copulation and sodomy.

"(2) On October 17, 1967, and in said premises, Jose Bruno Fajardo, described as a male caucasian, approximately 5'7", 147 pounds, black hair, brown eyes, 32 years of age, did solicit Deputy Sheriff Ray DeGenaro to engage in a homosexual act of oral copulation and did place his hand on the left leg of said Ray DeGenaro, in the vicinity of his crotch.

"(3) On October 18, 1967, and in said premises, Herbert Hantz Pagassinger, described as a male caucasian, approximately 5'8", 147 pounds, black hair, brown eyes, 37 years of age, did solicit Deputy Sheriff D. Ane to engage in a homosexual act of sodomy.

"(4) On October 18, 1967, and in said premises, John Gilbert Valencia, described as male caucasian, approximately 5'9", 140 pounds, brown hair, brown

eyes, 29 years of age, did solicit Deputy Sheriff R. J. Barrier to engage in homosexual acts of oral copulation and sodomy:

"(5) On October 18, 1967, and in said premises, Lorenzo Agapito Martinez, described as male caucasian, approximately 5'4", 138 pounds, black hair, brown eyes, 21 years of age, did solicit Deputy Sheriff Gary Burke to engage in a homosexual act of oral copulation and did additionally caress the right thigh area of the said Gary Burke.

"(6) On October 18, 1967, and in said premises, David Crispin Weiser, described as a male caucasian, approximately 6'0", 190 pounds, brown hair, brown eyes, 25 years of age, did solicit Deputy Sheriff J. Berger to engage in a homosexual act of oral copulation.

"(7) On October 18, 1967, and in said premises, Anthony DeCusatis, described as a male caucasian, approximately 5'8", 160 pounds, brown hair, brown eyes, 27 years of age, did solicit Deputy Sheriff E. Ward to engage in a homosexual act of oral copulation.

"(8) On October 23, 1967, and in said premises, Martin Maharis, also known as Michael L. Corsentino, described as male caucasian, approximately 5'7", 135 pounds, brown hair, brown eyes, 23 years of age, did solicit Deputy Sheriff A. J. Vereb to engage in a homosexual act of oral copulation.

"(9) On October 28, 1967, and in said premises, Kenneth St. Clair Scott, described as a male caucasian, approximately 5'7", 155 pounds, brown hair, gray eyes, 30 years of age, did solicit Deputy Sheriff R. J. Barrier to engage in a homosexual act of sodomy.

"(10) On October 28, 1967, and in said premises, Robert Norman Henry, described as a male caucasian, approximately 5'8", 140 pounds, brown hair, blue eyes, 33 years of age, did solicit Deputy Sheriff G. E. Burke to engage in a homosexual act of oral copulation.

"(11) On November 1, 1967, and in said premises, Joseph Henderson Hollyfield, described as male caucasian, approximately 6'4", 180 pounds, brown hair, brown eyes, 28 years of age, did grasp the private parts of Deputy Sheriff R. J. Barrier and solicit the said R. J. Barrier to engage in a homosexual act of oral copulation.

"(12) On November 1, 1967, and in said premises, Cornelio Mendez, described as male caucasian, approximately 5'6", 140 pounds, black hair, brown eyes, 31 years of age, did solicit Deputy Sheriff Robert J. Barrier to engage in a homosexual act of sodomy and oral copulation.

"(13) On November 1, 1967, and in said premises, Greg Wilson, also known as Harry Hersh, Jr., described as male caucasian, approximately 5'10", 152 pounds, black hair, brown eyes, 28 years of age, did rub the genital area of Deputy Sheriff Robert J. Barrier and did solicit the said Robert J. Barrier to engage in a homosexual act of sodomy.

"(14) On November 1, 1967, and in said premises, Maurice Vincent Morales, described as male caucasian, approximately 6'0", 170 pounds, brown hair, borwn eyes, 33 years of age, did solicit Deputy Sheriff J. Berger to engage in a homosexual act of oral copulation.

"(15) On November 1, 1967, and in said premises, Cyril J. Martinez, described as male caucasian,

approximately 5'4", 105 pounds, brown hair, brown eyes, 22 years of age, did solicit Deputy Sheriff R. D. Stockton to engage in a homosexual act of oral copulation.

"(16) On November 1, 1967, and in and about said premises, the above-named licensee, Corlan C. Keller, did, when he knew R. E. Stockton, R. G. Berger, and E. G. Ward were peace officers then and there engaged in the discharge and attempt to discharge their duties of office, wilfully resist, delay and obstruct said peace officers in a manner more specifically set forth below:

"(a) Immediately after the commission of the offenses described under subparagraph (15) above, and before an arrest of Cyril J. Martinez could be executed, Corlan C. Keller stated to Cyril J. Martinez in reference to Deputy Sheriff R. D. Stockton, 'He's vice and he'll bust you.' This statement was made in a low voice almost whispered into the ear of Cyril J. Martinez as Deputy Stockton and Mr. Martinez had left the premises. Mr. Keller then stepped back and in a louder than normal voice stated to Mr. Martinez, 'Didn't you leave something inside?' Cyril J. Martinez immediately fled to the interior of the licensed premises and Corlan C. Keller took position at the front entrance to said premises and did detain R. D. Stockton from entering the premises in order to affect the arrest of Cyril J. Martinez by demanding that R. D. Stockton present several pieces of identification. At this time Mr. Keller stated to Deputy Stockton, 'I know who you are, but you're not getting inside.' Ultimately Deputy Stockton was successful in gaining entrance to the premises and he located Mr. Martinez in the men's rest room.

"(b) After the arrest of Mr. Martinez respondent Corlan C. Keller was arrested and charged with a violation of Section 148 of the Penal Code. Mr. Keller did physically resist his arrest and did struggle against being placed in the transporting vehicle. At this time he kicked Deputy E. G. Ward in the groin area. Mr. Keller was handcuffed at this time and a headlock applied to restrain him. While en route to the sheriff's station respondent made statements to the arresting officers, in substance, 'Now you are in trouble. I have friends. You will never hear the end of this.' At one point Mr. Keller, who was a passenger in the back seat, raised his leg or legs, and struck Officer Burger, a passenger in the front seat, in the area of the back.

"COUNT II

"Continuance of the above designated license would be contrary to the public welfare and morals in that respondent, Corlan C. Keller, is not a qualified person to hold a license as shown by his conduct. The findings as to the entire subcount (16) are hereby incorporated by this reference as though fully set forth and restated herein.

"FINDINGS AS TO PREVIOUS RECORD:

Licensed since July 26, 1967. No prior disciplinary action.

"DETERMINATION OF ISSUES PRESENTED:

"Respondent violated Section 25601 of the Business and Professions Code as to Count I and permitted violations of Section 647(a) of the California Penal Code as to Count I. Respondent did violate Section 148 of

the California Penal Code. Respondent has demonstrated that he is antagonistic and uncooperative toward law enforcement officers and by such conduct respondent has demonstrated that he is not a qualified person to hold a license. Under such circumstances continuance of the license would be contrary to public welfare and morals as to Count II. Grounds for the suspension or revocation of the license were established under the provisions of Section 24200(a) of the Business and Professions Code and Article XX, Section 22 of the California Constitution."

Before discussing the merits of this appeal, we point out that with respect to count I, the department's findings of fact refer to the period "From October 17, 1967, until the date of the filing of this accusation." Such finding is in error. The record before us shows that the department's accusation was served on December 20, 1967. The evidence presented by the department is confined to the period October 17, 1967, to November 1, 1967. We accordingly consider the period involved to be the 16 days starting on October 17, 1967, and terminating on November 1, 1967.

In connection with the administration of laws relating to the sale of alcoholic beverages, several principles have been established. The business of selling intoxicating liquor is one attended with dangers, and under the police power, the state may limit the operation of such business to conditions which will minimize its evils. (*Kirchhubel v. Munro,* 149 Cal. App.2d 243, 308 P.2d 432.) There is an affirmative duty on the licensee to maintain and operate his premises in accordance with the law, and failure to discharge this duty may amount to permitting any prohibited conduct to occur.

(*Ballesteros v. Dept. of Alcoholic Bev. Control*, 234 Cal.App.2d 694, 44 Cal. Rptr. 633; *Marcucci v. State Bd. of Equal.*, 138 Cal. App.2d 605, 292 P.2d 264.) It is well settled that the revocation or suspension of a license is not penal in nature but is a mechanism by which licensees who have demonstrated their ignorance, incompetency, or lack of honesty or integrity may be removed from the licensed business. The legislation was not intended to provide for punishment but to afford protection of the public. (*Meade v. State Collection Agency Bd.*, 181 Cal. App.2d 774, 5 Cal. Rptr. 486; *Cornell v. Reilly*, 127 Cal. App.2d 178, 273 P.2d 572.)

The record shows that the department's decision was issued on January 23, 1969. Appellant filed a petition for reconsideration on February 19, 1969, and the department by its order of February 20, 1969, denied the petition for reconsideration. Appellant's appeal brings the matter to this board for review.

At the time of the department hearing, it was stipulated that if called, each of the officers involved (subcounts (1) to (15), count I) would testify as to those facts as set forth in the department's accusation. The stipulation constitutes substantial evidence supportive of the department's findings as to the 15 incidents set forth under count I.

Concerning subcount (16) (a) and (b) of count I and count II, the record contains the testimony of Deputy Sheriff Raymond D. Stockton who testified as to being at appellant's premises on November 1, 1967, at approximately 1:30 a.m. and his subsequent encounter with the licensee which is set forth in subcount (16) (a) and (b). Deputy Sheriff Edward Ward testified as

to his observing Deputy Stockton and a person, subsequently identified as Cyril Martinez, leave the premises; that within two or three minutes thereafter Martinez re-entered the premises; that Martinez moved rapidly when he re-entered and ran up to the office and pounded on the door; and that he then went into the men's restroom. (R.T. 55.) Deputy Ward testified as to being kicked by the licensee when he and Deputy Berger were trying to place the licensee in a vehicle for transportation to the West Hollywood Sheriff's Station. Deputy Ward also testified that while in the automobile Mr. Keller kicked Deputy Berger in the back and that in attempting to place a hold on Mr. Keller he (Mr. Keller) sustained a laceration of the lip. (R.T. 58.) Lt. Carl Seltzer, Los Angeles Sheriff's Department, testified as to an interview he had with Mr. Keller on October 28, 1967. The interview was recorded and certain parts of the interview concerning the policy of the licensee as to identifying vice officers to patrons in the premises was, over objection, read into the record. (R.T. 161.)

The licensee Corlan C. Keller testified as to the operation of the licensed premises and denied telling the patron Martinez to watch out for the vice. He testified that Deputy Stockton looked intoxicated and that was the reason that he would not let Stockton reenter the premises. He also testified as to the scuffle with the deputies and his arrest and subsequent transportation to the sheriff's station. Ten declarations from ten different individuals who conduct businesses in close proximity to appellant's premises were introduced into evidence. (Respondent's exhibit A.) The declarations were directed to the good business reputation of

the licensee and the licensed premises in the neighborhood. Miss Dale Sherwood testified that Mr. Keller had rented an apartment from her on and off for approximately four years; that she had been in appellant's licensed premises at various times; that Mr. Keller enjoys a good reputation in the area; and that she had never witnessed any disorderly conduct on the licensed premises.

In written argument, appellant has asserted a number of grounds as constituting cause for reversal of the department's decision. The following numbered paragraphs cover the major contentions raised by appellant:

(1) Section 25600 of the Business and Professions Code is unconstitutionally vague in violation of Amendment Fourteen, United States Constitution.

This matter does not involve section 25600 of the Business and Professions Code. The department has here charged appellant with the violation of section 25601 of the Business and Professions Code (disorderly house). Section 25600 of the Business and Professions Code pertains to the giving of free goods in connection with the sale of alcoholic beverages. A recent decision of the department involving the same licensee pertained to a violation of section 25600, *supra*. We consider appellant's argument to be directed to section 25601, *supra*. With respect to section 25601, the appellate courts of this state have on numerous occasions reviewed this particular statutory enactment. In the re-

cent case *Los Robles Motor Lodge, Inc. v. Dept. of Alcoholic Bev. Control* (1966), 246 Cal. App. 2d 198, 54 Cal. Rptr. 547, the court had the following to say:

> ". . . The section in material part reads: 'Every licensee, or agent or employee of a licensee, who keeps, permits to be used, or suffers to be used, in conjunction with a licensed premises, any disorderly house or place in which people abide or to which people resort, * * * for purposes which are injurious to the public morals, health, convenience, or safety, is guilty of a misdemeanor.' There is no uncertainty in that definition. The section being clear, there can be no doubt of its constitutionality as a valid exercise of the state's police power. . . ."

(3) Appellant was denied due process of law in that the accusation did not state any offense upon which disciplinary proceedings could be had and, further, no notice of any such issues was given. The record shows that appellant had opportunity to object to the form of the accusation. (Section 11506, Government Code.) He did not file a special notice of defense. He did not claim lack of notice. The record before us consists of the hearing granted to appellant. In our opinion, there has been full compliance with the provisions of the Administrative Procedure Act. Appellant has been afforded due process.

(4) and (5) Appellant contends that the department's decision is contrary to fact and law in that there is no finding of a violation of Business and Professions Code section 25600 (it is presumed that appellant here refers to section 25601) and that there is not cause for disciplinary action shown under Business and Profes-

sions Code sections 24200(a) and (b). Appellant also contends that the department's decision and findings of fact are not supported by competent evidence.

The department's decision clearly shows that as to count I appellant violated section 25601, Business and Professions Code, and permitted violations of section 647(a) of the Penal Code. The department also found that appellant violated section 148 of the Penal Code. These violations were determined to constitute cause for the suspension or revocation of appellant's license under the provisions of section 24200(a) of the Business and Professions Code and article XX, section 22 of the California Constitution. The findings are supported by substantial evidence and support the department's decision.

(6) There is no showing of knowledge or notice on the part of appellant as to the purported violations.

It is clear that section 25601 contains no language to the effect that the violation provoking disciplinary action must be knowingly done. Knowledge is not required in cases involving violations of section 25601. It is only necessary to show that the acts took place on the licensed premises. (*Benedetti v. Dept. of Alcoholic Bev. Control*, 187 Cal. App.2d 213, 9 Cal. Rptr. 525; *Morell v. Dept. of Alcoholic Bev. Control*, 204 Cal. App.2d 504, 22 Cal. Rptr. 405.)

(7) The decision violates section 11518 of the Government Code in that there is no finding of fact or law made as to all the issues presented at the hearing.

In our opinion, findings were made as to all pertinent issues and there has been full compliance with the provisions of section 11518 of the Government Code.

(8) Proceedings herein are null and void in that they were conducted in violation of section 11517(b) of the Government Code in that the proposed decision was not served upon the respondent prior to the time that it was adopted by the agency.

Government Code section 11517 does not require the service of the department's decision upon the licensee prior to its adoption by the department. (*Dami v. Dept. of Alcoholic Bev. Control,* 176 Cal. App.2d 144, 1 Cal. Rptr. 213; *Stoumen v. Munro,* 219 Cal. App.2d 302, 33 Cal. Rptr. 305.)

We find no merit in the remaining arguments asserted by appellant. In our opinion, appellant has failed completely in attempting to show any infringement or curtailment of his constitutional rights under the Fourth, Ninth, Tenth and Fourteenth Amendments to the United States Constitution.

Finally, appellant contends:

> "The penalty recommended to be imposed is disproportionate to the offense committed, if any was committed, and in any event, is incomprehensible and just plain silly when one considers that we are dealing with an on-sale beer license."

As previously mentioned, there is an affirmative duty on the part of all licensees to maintain and operate their licensed premises in accordance with the law. (*Givens v. Dept. of Alcoholic Bev. Control,* 176 Cal. App.2d 529, 1 Cal. Rptr. 446.) Merely because we are here concerned with an on-sale beer license does not, in any manner, lessen the licensee's responsibilities. It is well settled that the propriety of the penalty imposed by an administrative agency is a matter vested in

the discretion of such agency and its decision thereon will not be disturbed unless there has been a clear abuse of discretion. (*Macfarlane v. Dept. of Alcoholic Bev. Control* (1958), 51 Cal.2d 84, 330 P.2d 769.) We find no abuse of discretion in the instant proceeding.

In view of the foregoing, the decision of the Department of Alcoholic Beverage Control in the present proceeding is hereby affirmed.

JAMES M. SHUMWAY, CHAIRMAN
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

We Concur:
Manuel Quevedo, Jr.
Adrienne Sausset
Sacramento, California
October 31, 1969